89-9780

Supreme Court, U.S.
FILED
DEC 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EMERSON SUTTON

Petitioner

vs.

United States Department of Housing & Urban Development; Kenneth D. Lange; Charles H. Hopkins; Secretary of Housing and Urban Development(Appendix Page); William Krueger, Auditor with the Inspector General's Office of HUD (T.PH.P.54) Pursuant to Rule 19 and 21 F.R.C.P.

Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eight Circuit

Emerson Sutton, Petitioner
2141 Yale
Maplewood, Missouri 63143
(314) 781-2222

(T = Transcript; PH = Preliminary Hearing; TR = Trial; L.F. = Legal Files; P Ex = Plaintiff's Exhibit; Apx = Appendix)

THE QUESTION PRESENTED

Question I - Due Process

THE VERDICT OF THE COURT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO THE LAW AS DEFENDANT HAD VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS IN FAILING TO GIVE SUBSTANTIVE NOTICE AND A HEARING PRIOR TO TERMINATION OF PLAINTIFF'S MEMBERSHIP FROM THE PRIVATE FEE APPRAISER PANEL

Reason(s) for Granting Review:

1) The 8th Cir C.A. has decided an important question of federal law in the interpretation of the Federal Statute 42 USC S3535(d) which as drafted and

construed is unconstitutionally ambiguous and vague on its face within the meaning of due process and which has not been interpreted by the U.S. S. Ct., but should be Kolender v Lawson, Alcoa Steamship, Gonzalez 573.

2) The 8th Cir C.A. has decided an important question of Federal Law in the interpretation of 42 USC S3535(d) which conflicts with U.S. S. Ct. decision on the same matter by permitting statutory discrimination between two like classes of fee appraisers by calling one termination and the other nonrecertification (P Ex 7) and then rationalizing it by assigning them different labels of "unsatisfactory performance" and "unprofessionalism in dealing with the public" (Apx. pA6,A8,A13, Footnote 4; P Ex 10-11, page 1-9, section 1-12)

Richardson v Belcher, Fowler v U.S. (Apx p.)

In petitioner exhibit 7, respondent in 3 separate places informs petitioner that he is "Terminated" as well as not recertified.

3) The decision of the 8th Cir C.A. "that appellant's interest in recertification is not within the range of property and liberty interest protected by the due process clause" (Apx p.A6,A10,A14) is contrary to Missouri State law and U.S. Ct. decisions Greene v McElroy; Board of Regents v Roth; Missouri Teacher Tenure Act; George h. Evans.

4) The decision of the 8th Cir C.A. that "we do not believe that the procedures set out in the handbook create a property interest" (Apx pA6,A14, Footnote 5) is contrary to

Missouri State law, other Fed Cir decisions listed in reason 3 below and the opinions of Paige v Harris, Thomas v Ward, McDonald v Mims, Missouri Teacher Tenure Act.

5) The decision of the 8th Cir C. A. that petitioner has not identified the source of his property right " is reason enough for our affirmance of the District Court's adverse judgement on appellant's due process claim" (apx p.A8-A10) is contrary to other Fed Cir decisions listed in reason 2 above and the opinions of Mathes v Hornbarger, Hertz v Degnan, Orloff v Cleland, George H. Evans.

6) The decision of the 8th Cir C.A. that "while it appears that plaintiff was entitled to a written notification of the reasons for his removal prior to expiration of his certification, this

omission alone cannot support a successful action against any of the defendants where plaintiff's non-recertification was justified" (apx p.A9-A10, Footnote 3) is contrary to U.S. S. Ct. decision Cleveland Board of Education v Loudermill, Missouri Teacher Tenure Act.

7) The 8th Cir C.A. has decided an important question of Fed Law that is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision Gonzalez 573.

8) The decision of the 8th Cir C. A. that "HUD did not make any charge against him that might seriously damage his standing and associations in his community" (Apx p.A16) is contrary to

the opinions of other Fed Cir decisions ATL, Inc. v U.S., Covert v Harrington, Lefkowitz v Turley

Question II - Arbitrary and Capricious

THE VERDICT OF THE COURT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO THE LAW AS DEFENDANT'S ACTION IN TERMINATION PLAINTIFF FROM THE PRIVATE FEE APPRAISER PANEL WAS ARBITRARY AND CAPRICIOUS

Reason(s) For Granting Review

9) The decision of the 8th Cir C.A. in justifying respondent summary actions because of petitioner's Bankruptcy(ies) is contrary to U.S. S. Ct decision Perez v Campbell, In re Water Gap Village. (Apx pB7-B9)

10) The decision of the 8th Cir C.A. that "we believe HUD justifiably found that appellant had not exhibited 'professionalism in dealing with the public'" (apx p.A19-A20) is contrary with the opinions of other Fed Cir decisions Bonet v U.S., D.E. v Dept. of Navy, Gloster.

11) The decision of the 8th Cir C. A. is contrary to the U.S. S. Ct. decision in Neustadt because petitioner was punished coerced and defamed for his alleged actions as a "mortgagor" and not for his
actions as an "appraiser" and because "THERE IS NO LEGAL RELATIONSHIP BETWEEN THE FHA AND THE INDIVIDUAL MORTGAGOR". id. NEUSTADT. (Apx p. 19-20)

THE PARTIES

Emerson Sutton.....Petitioner

U.S. Department of Housing & Urban Development.....Respondent

Kenneth D Lange.....Respondent

Charles H. Hopkins.....Respondent

Secretary of Housing and Urban Development (Apx p.B16).....Respondent

William Krueger, Auditor with The Inspector General's Office of HUD 9T. Ph. p. 54) pursuant to F.R.C.P. 19 and 21.....Respondent

TABBLE OF CONTENTS

PAGE

Questions I and II Presented/
Reasons for Granting
Review.....ante - 2

The Parties.....ante - 9

Table of Contents.....ante - 10

Table of Authorities.....ante - 11

Opinion Below..... 1

Jurisdictional Statement..... 1

Main Constitional, Statutory and
Code of Federal Regulations
Involved..... 8

Statement of the Case.....10

Argument for Question I -
Due Process.....15

Argument for Question II -
Arbitrary and Caprious.....32

Relief Requested.....42

Conclusion.....48

TABLE OF AUTHORITIES

Page

Abraham v Hills 547 F2d 1062, 1069 (9th Cir 1976).....2

Alcoa Steamship Co. v Federal Martime Commission 348 F2d 756 Note 2 (D.C.Cir 1965).....34

Aetna Cas. & Sur. Co. v U.S. 655 F2d 1047, 1048 Note 6 & 7 (U.S. Ct. Cl).....34

Allison v Block 723 F2d 631 (8th Cir 1983).....19,38

Arnett v Kennedy 416 U.S. 134, 166 (1974).....16

ATL v U.S. 736 F2d 677, 682 (Fed, Cir. 1984).....25

Ex Parte Bain 121 U.S. 1,13 (1886).....26,38

Bell v Hood 327 U.S. 678 Notes 2 & 3 (1946).....3

Bishop v Wood 426 U.S. 341, 344 (1976).....18

Board of Regents v Roth 408 U.S. 564, 576-578 (1972).....9,15

Bonnet v U.S. Postal Service 661 Frd 1071, 1072 (5th Cir 1981).....32

Bouie v City of Columbia
378 U.S. 347.....24

Carlson v Green 100 S Ct 1469
Note 1, 2 & 6 (1980).....1

Cleveland Board of Education v
Loudermill 470 U.S. 532, 533
(1985).....22

Covert v Harrington 876 F2d 751
(9th Cir 1989).....28

Craig v Boren 429 U.S. 190, 195
(1976).....4

D.E. v Dept. of Navy, MSPD 721
F2d 1164 (9th Cir 1983).....33

Davis v Mansfield Housing
Authority 751 F2d 180, 181
Notes 2 & 5 (6th Cir 1954).....6,16,24

Davis v Romney 490 F2d 1360,
1361 (3rd Cir 1974).....6

Fowler v U.S. 633 F2d 1258,
Note 1 & 5 (8th Cir 1980).....37

Frisby v U.S. Dept. of HUD 755
F2d 1052, 1055 (3rd Cir 1985).....32,40

George H. Evans & Co. v U.S.
169 F2d 500 Note 2,7,9
(3rd Cir 1948).....21

Gloster v GSA 720 F2d 700
(D.C. Cir 1983).....33

Gonzalez v Freeman 334 F2d 570
(D.C. Cir 1964).....19,21,22,23,38

Greene v McElroy 360 U.S. 474,
475 Note D (1959).....19,29,34

Greene v U.S. 376 U.S. 149,
Note D.....46

Harmon v Brucker 353 U.S. 579
582 (1958).....7

Herz v Brucker 648 F2d 201
Note 1 (3rd Cir 1981).....18

Johnson v U.S. Dept. of
Agriculture 734 F2d 774, Note 1,
12 (11th Cir 1984).....16,40

Kolewder v Lawson 461 U.S. 352
(1983).....34

Larry v Lawler 605 F2d 954, 958
(7th Cir 1978).....30

Lefkowitz v Turley 414 U.S. 70,
83-84 (1973).....30

Mars v Kleppe 520 F2d 867, 868
(10th Cir 1975).....6

Marshall v Jerrico, Inc. 446
U.S. 238, 242-243 & N. 2.....22

Mathes v Horbarger 821 F2d
439 Note 3 (7th Cir 1987).....18

Mayo v Lakeland Highlands
Canning Co. 309 U.S. 310 (1940).....40

McDonald v Mims 577 F2d 951
(5th Cir 1978).....17

Memphis Light, Gas & Water

Division v Craft 436 U.S. 1,
11-12 (1978).....16

Missouri Teacher Tenure Act V.A.M.
S. 168.104 (OP. ATTY. GEN. NO. 233,
Holliday 10-24-72).....7,9,17,19

Morton v Ruiz 94 S Ct. 1055,
1056 Note 7 (1974).....19,30

Old Dominion Dairy Products,
Inc. v Sec. of Defense 631 F2d
953, 966 N.24 (D.C. Cir 1980).....29,30

Oldroyd v Kugler 461 F2d 535
(3rd Cir 1972).....40

Orloff v Cleveland 708 F2d 372,
373 Notes 3,7, 12-19
(9th Cir 1983).....18

Paige v Harris 584 F2d 178
Note 1 & 4 (7th Cir 1978).....17

Parrott v Taylor 451 U.S.
527 (1981).....20

Paul v Davis 424 U.S. 693,
709 (1976).....28

Perez v Campbell 401 U.S. 637.....26

Perry v Sinderman 408 U.S.
593 (1972).....9,15

Richardson v Belcher 404 U.S. 78,
83, 92 (1971).....37

In re Ruffalo 390 U.S. 543,
550 (1968).....26,39

Scannell Laboratories, Inc v

Shaffer 424 F2d 859
(D.C. Cir 1970).....5

Silver v Cormeir 529 F2d 161
(10th Cir 1976).....41

Seven Oaks v FHA 171 F2d 947, 948
(4th Cir 1948).....7

Standard Airlines v Civil
Aeronautics Board 177 F2d 18,
20 Notes 2 & 3 (D.C. Cir 1949).....41

Stanley v Illinois 405 U.S.
645, 647.....20

Stark v Wickard 321 U.S. 288
Note 3 (1944).....3

Stirone v U.S. 361 U.S. 212.....26,39

Squarez v Weaver 484 F2d 678
(6th Cir 1973).....25

Thomas v Ward 529 F2d 916
Note 1 (4th Cir 1975).....17

U.S. v Neustadt 366 U.S. 696,
709 (1961).....34

Vitarell v Seaton 359 U.S. 535,
539.....20

Warren v Government Nat. Mtg.
Ass'n 611 F2d 1229, 1235
(8th Cir 1980).....34

In re Water Gap Village 59 B.R.
23, 26-27 (Bkrtcy D.N.J. 1985).....26

Wellner v Minnesota State Junior College 487 F2d 153 (8th Cir 1973).....28

Ex Parte Young 209 U.S. 123-125.....6

OPINION BELOW

On July 18, 1988, the U.S. District Judge, Stephen N. Limbaugh issued a unreported Memorandum Opinion, Finding of Fact and Conclusion of Law permitting the joining of the Secretary of HUD as a party defendant and entered judgement in favor of defendants (Apx p. B16).

On September 19, 1989, the 8th Cir C.A., Judges Bowman, Ross and Wollman affirmed the judgement of the District Court (Apx p. A21) and both decisions are unreported.

JURISDICTIONAL STATEMENT

Petitioner seeks review of a decision of the 8th Cir C. A. entered on September 19, 1989 per Supreme Court Rule 17 and Carlson v Green 100 S. Ct. 1469 Note 1,2 & 6 (1980).

The present petition is a complaint for monetary, injunctive and declaratory relief and was filed within ninety (90) days of the September 19, 1989 Appeal Court Decision and the amount in controversy exceeds $10,000.00.

This is a action against the Secretary of HUD, the U.S. Department of Housing and Urban Development, and the individual respondent's as opposed to a suit against the U.S., and as such, the judgment sought can be paid out of the separate funds in the control and possession of the Secretary of HUD, that are severed from U.S. Treasury funds and control, such as the HUD reserve fund for operating subsidies in Abraham vs Hills 547 F2d 1062, 1069(9th Cir 1976); the money in the Special Risk Insurance

Funds 12 USC S1715Z 1 and 3, and; 12 USC S1735 c(a)(b)(c)(d).

The U.S. Congress waived HUD's sovereign immunity to suits under the National Housing Act S1, U.S.C. S1702 and 5 U.S.C.A S.701,702, 5 USCA S701,702; 11 USCA 106(A) (P.Ex. 7;T PH. p. 27;).

"Where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or laws of the U.S., the court must entertain the suit" Bell v Hood 327 U.S. 678, Notes 2 & 3 (1946) Stark v Wickard 321 U.S. 288, Note 3 (1944).

Petitioner brings this action pursuant to Rules 23 (a), 23(b) (4), and 23 (b) 2 of the Federal Rules of Civil Procedures. Plaintiff's class (3) consists of all fee appraiser in the U.S. Department of HUD program who have

been or who could be terminated or not recertified WITHOUT sufficient due process procedural requirements.

Petitioner's class is so numerous as to make it impracticable to bring them all before the court, but there are questions of law and fact common to the class and the claims of the petitioner are typical of the claims of the class, and petitioner will fairly and adequately protect the interest of the class Craig v Boren 429 U.S. 190, 195 (1976).

The U.S. Department of HUD is an agency of the Federal Government, whose main office is in Washington D.C., but who conducts business thru-out the U.S. of America and most specifically the State of Missouri.

Petitioner is a Black citizen of the U.S. of America and a resident of

St. Louis County Missouri. Respondent Hopkins and Lange are white residents of St. Louis Missouri. Respondent, United States Department of Housing and Urban Development and the Secretary of HUD are located in Washington D.C. Respondent Krueger, who is white, is employed by the St. Louis HUD office, and his address is unknown.

Thus jurisdiction of this Court is invoked under the District Court and Court of Appeal jurisdiction and pursuant to Title 28 USC S1254 (1) and (2) and the diversity jurisdiction of Scanwell Laboratories, Inc.. v Shaffer 424 F2d 859, Note 2 (D.C. Cir 1970); 28 USC 1391;1332.

Jurisdiction vested in the District Court pursuant to the due process clause; 5 USC 1009; 28 USC Section 1343, 1361, 1651, 2201, & 2412;

and 42 USC 1981, 2000d and 3535(d)5 U.S.C.S702.

Jurisdiction of the Court of Appeal was invoked under the District Court jurisdiction and Ex parte Young 209 U.S. 123,124-125; U.S. Const. Amend 5 & 14-Art 3, S 1 et. seq.; 28 USC 1291: 28 USCA 1337 per:

Davis v Romney 490 F2d 1360, 1361 (3rd Cir 1974 Davis v Mansfield 751 F2d 180 (6th Cir 1984) . . . 28 USCA S1346 (a) (2) per Mars v Kleppe 520 F2d 867, 868 (10th Cir 1975) 18 USCA S1951 (Hobbs Act).

Additional jurisdiction of this Court is invoked per 41 USC SS 601-613 (Contract Dispute Act of 1978); 31 USC S3716, S2 et. seq., 96 Stat. 1749; S3711 (a); S3701 (a) (1); 4 CFR S101.2 (a) (Debt Collection Act of 1982); SS1961-1968, 1964(c) (RICO Act); 24 CFR

24; 24 CFR 10.1-10.20; 8th Const. Amend - Cruel and Unusual Punishment.

Further jurisdiction of this Court is invoked per the Missouri Teacher Tenure Act V.A.M.S. 168.104 (Op. Atty. Gen. No. 233, Holliday, 10-24-72); Seven Oaks v FHA 171 F2d 947, 948 (4th Cir 1948); 28 USCA S1402; Harmon v Brucker 353 U.S. 579, 582(1958); 42 USCA S3535(o); S1983 and all the previously indentified jurisdiction invoked in the District Court, the Court of Appeal and case law cited above, and the U.S. S. Ct. Art III, Pt VII of the Appellate Court Jurisdiction per the liberal amendment provisions of 28 USC S 1653.

MAIN CONSTITUTIONAL,STATUTORY AND CODE OF FEDERAL REGULATIONS INVOLVED.

1) The 14th Const. Amend states in pertinent part as follows: " No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state deprive any person of life, liberty, or property, without due process of the law ". . . The requirements of the 14th Amendment apply to the U.S. Government and its agencies thru the due process clause of the 5th Amendment Paul vs Davis 424 U.S. 693, 702 N.3.

2) The 5th Amendment to the Constitution incorporates the due process requirements of the 14th Amendment as it applies to the U.S. Government and its agencies id. Paul vs Davis U.S. Const Art III S2.

3) Missouri "Teacher Tenure Act " V.A.M.S. Section 268.104 is petitioner's reference to State Law Procedures and said act defines a "Permanent Teacher" as "any teacher who has been employed or who is hereafter employed as a teacher who has been employed in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district" Board of Regents v Roth; Perry v Sindermann.

4) 24 CFR 24 and 24 CFR 10.1-10.20 (HUD Policy and Rulemaking Procedures) HUD Handbook 4020.1 and subsequent Change 5 and 5 USCA S701-702 and 42 USC 3535 (d) and (o)

5) 8th Const. Amend "Cruel and Unusual Punishment"

STATEMENT OF THE CASE

The U.S. Dept of HUD insures mortgage loans made by private lenders. In order to insure same, HUD requires the subject property to be appraised by a HUD certified appraiser. In order to become HUD certified, an appraiser files an application for certification with HUD. If he meets HUD standards, said applicant's name is placed on a panel of private fee appraisers to be automatically recertified annually and to be removed only for cause and only then in accordance with due process.

Upon request for an appraisal, HUD selects a name from said panel and that person is assigned to conduct the appraisal. No loan may be insured by HUD except upon appraisal by a panel member. An appraisal either by a non-panel member or by a panel member,

without HUD assignment, is not accepted by HUD.

On May 1, 1971, plaintiff Emerson Sutton, a Black citizen of the U.S. and a resident of Missouri was certified as a member of said private fee appraiser panel for the St. Louis HUD office for a period of one year. He was subsequently recertified as an appraiser for each of the annual periods, thereafter, between May 1, 1972 through April 30, 1987. Because he had the necessary qualifications at the time of his original certification and upon his initial and subsequent recertifications, he thus established a propertly interest in the contractual relationship of recertification in both the contract and the appraisal fees that he earned.

On April 21, 1987, petitoner received a letter from HUD stating that

he would not be recertified to said panel effective May 1, 1987. No reason was given for said action. (Apx p.A3) Therefore, petitioner, on April 23, 1987 by a letter to HUD, requested: (a) the reason for such action(P Ex 6, Page 4, Item A & E) (b) documentary support therefor, (C) a hearing thereon and (d) a stay of said action pending hearing. (Apx p.B4)

In a letter dated April 29, 1987, defendant advised petitioner that the stay was denied and that documents would be produced. Again no reason was advanced for defendants termination of petitioner from said appraisal panel and no hearing was held by the Department prior to said termination of petitioner,s membership on said panel. Neither the President, nor Congress authorized HUD to deprive petitioner of

his recertification property interest in a proceeding in which he was not afforded due process.

Respondent terminated petitioner's recertification on May 1, 1987 in violation of Petitioner's due process rights and then on May 14, 1987 (P Ex 9) forwarded the requested documents and for the first time provided petitioner with a reason for said termination, i.e. allegedly because of petitioner's alleged wrongful; possession and use, for petitioner's allegedly own personal benefit and gain, of real properties at 4214 Marlin and 8417 St. Olaf, St. Louis, Missouri, and the rents allegedly derived therefrom allegedly after these properties were allegedly foreclosed upon and conveyed to HUD, during the pendency of petitioner's bankruptcy(ies).(Apx pA4) The court's

consideration of any matters outside of P. Ex 9 is a violation of Petitioner's due process rights. (Apx pB6-B9)

Petitioner brought action to compel his recertification in the U.S. District Court and the U.S. Court of Appeal on due process grounds and the grounds of arbitrariness and capriciousness of the decision. Subsequently both Courts found for Respondent and Petitioner herein appeals. Petitioner request oral argument on the issues.

QUESTION I - DUE PROCESS

The Appeal Court Decision (Apx p.14&15) is that petitioner's constitutional claim depends on him having a property right or interest in the governmental benefit of original certification and fifteen (15) consecutive, unreprimanded and uninterrupted annual recertifications to the fee appraiser panel. Board of Regents v Roth 408 U.S. 564, 576-578 (1972) Perry v Sindermann 408 U.S. 593, 603 (1972).

If petitioner has a property right or interest in his original certification and subsequent recertifications, HUD cannot deprive petitioner of same without the notice, hearing and procedural requirements of

due process (T. Ph. p. 40-47) Memphis Light, Gas & Water Div. v Craft 436 U.S. 1, 11-12 (1975).

That is, if the relevant statutes, regulations or practices require cause in order to withdraw a particular benefit, a property right exists which (P Ex 7); is protected under the constitution Arnett v Kennedy 416 U.S. 134, 166 (1974) (Powell, J. concurring) Johnson v U.S. Dept. of Agriculture 734 F2d 774, Note 2 (11th Cir 1984) Davis v Mansfield Housing Authority 751 F2d 180, 181 Notes 2 & 5 (6th Cir 1984).

Property interests, of course, are not created by the constitution. Rather they are created and their dimensions and entitlements are defined by existing rules or understandings that stem from an independent source which can be referenced to state law such (Apx p A8)

as the Missouri Teacher Tenure Act V.A.M.S. 168.104 (Op Atty Gen No 233, Holliday, 10-24-72) "or" to rules and understandings such as common law, breach of contract, the Code of Federal Regulations 24 CFR 24 and 24 CFR 10.1-10.20, Federal Statue 42 USC S3535(D) and (o), "and" the HUD Handbook 4020.1 and subsequent change 5 and HUD Memorandum, which in this case are all identified by petitioner as the source of his property right or interest in certification and recertification to the fee appraiser panel (P Ex 8, 10, 11, Page 1-9, item 1-12; T Ph p 7, 10, 40-43); (Apx pA16; Apx pA14, Footnote 5) Paige v Harris 584 F2d 178, Note 1 & 4 (7th Cir 1978) Thomas v Ward 529 F2d 916, note 1 (4th Cir 1975) McDonald v Mims 577 F2d 951 (5th Cir 1978). (Apx p A8-A11)

As per Bishop v Wood 426 U.S 341, 344 (1976), Petitioner's has a statutory entitlement, expectancy, property right, and interest in the governmental benefit of original certification and 15 annual recertifications to the fee appraiser panel and his loss appraisal fees (T Ph p 13-18; T Tr p 26; P Ex 19-20); (Apx pA8-A11) Mathes v Hornbarger 821 F2d 439, Note 3 (7th Cir 1987) Herz v Degnan 648 F2d 201, Note 1 (3rd Cir 1981) Orloff v Cleland 708 F2d 372, 373 Notes 3, 7, 12-19 (9th Cir 1983)

Said HUD Handbook 4020.1 and subsequent Change 5, and HUD Memorandum points to some of the sources of petitioner's property rights and interests. Said Handbook, Subsequent Change 5 and Memorandum created rules, regulations,understandings and equitable

rights generated by HUD for the expectancy of the continuing governmental benefit of original certification and continuing annual recertifications that could not be removed except for cause, and only then thru the procedural requirements of due process. (Apx pA14, Footnote 5) Morton v Ruiz 94 SCF10SS, 1056 Note 7 (1974); Greene v McElroy 360 U.S. 474,475 Note D (1959)

Even with cause, "REMOVAL OF A PERSON FROM SAID PANEL, MUST BE PROCEEDED BY WRITTEN NOTIFICATION OF THE REASONS FOR THE DECISION" (P Ex 10-11, p 1-9, Sec 1-12); (Apx p.A12) Gonzalez v Freeman 334 F2d 570, 573 578-579 (D C Cir 1964) Allison v Block 723 F 2d 631, Note 1 (8th Cir 1983) Missouri Teacher Tenure Act V.A.M.S. 168.104.

HUD obligation and requirement to comply with its established procedural standards for removal of fee appraisers from the panel applies even where the fee appraiser, in the absence of such standards, could have been summarily discharged at anytime without procedural safeguards Vitarelli v Seaton 359 U.S. 535, 539

Pretermination procedures are not always required. However, the denial of a pretermination hearing can only be justified when such a hearing is impractical or there is a necessity for quick action-neither of which were warranted in this case (T Tr p 24); (Apx p.A17, Footnote 6) Parrott v Taylor 451 U.S. 527 (1981) Stanley v Illinois 405 U.S. 645, 647.

Because of the original certification and 15 recertifications a

"contact" right existed between Mr. Sutton and HUD id. Gonzalez. As such, another of Mr Sutton's property rights comes from his right to bring this action for breach of contract George H. Evans & Co. v U.S. 169 F2d 500 Note 2, 7, 9 (3rd Cir 1948).

Petitioner's pre and post termination due process rights were violated because (a) the HUD Handbook 4020.1 and subsequent Change 5, and HUD Memorandum requirements of notice and hearing had already been violated prior to the offered "meeting" (P Ex 7,8,9,10,11, page 1-9, See 1-12;Apx pA5,A6,A17,Footnote 6) and (b) because HUD refused to comply with the procedural requirements of 42 USC S3535(d) and (o), 24CFR 10.1-10.20, 24 CFR 24 (P Ex 7; T Tr p 23); and (c) because "Mr Sutton was the only one that

you didn't recertify who had no problem with his performance as an appraiser" (T Tr p 28); and (d) because there were no other appeal or post termination procedures available to petitioner for a fair hearing by an impartial arbiter, since the HUD Office Manager that Sutton could appeal to had already informed Sutton that he was "terminated" prior to providing him with a reason for said termination (P Ex 7, Apx pA5) in violation of Due Process, Marshall v Jerrico, Inc., 446 U.S. 238, 242 243 Note 2 (1980) Cleveland Board of Education v Loudermill 470 U.S. 532, 533 (1985) Gonzalez v Freeman 334 F2d 570, 573, 578-579 D C Cir 1964)

Further, the "meeting" and discussion offered Sutton (P Ex 5,7, 9) would be informal not formal; there would be no evidentiary hearing and no

4) Bouie v City of Columbia, 378 U.S. 347 Davis v Mansfield Metropolitan Housing Authority 751 F2d 180.

Sutton's liberty interest in his reputation, employabilities opportunities, standings and associations in the community have been, is currently being and will continue to be seriously damaged, stigmatized and hampered because of the false and ultra-vires allegations which were willfully, fraudulently and negligently made public to person(s) and agencies(ies) not a part of or party(ies) to the decisionmaking process or body (T Tr p 13, 16, 18); (Apx pA16).

Said false and ultra-vires allegations were brought in bad faith, discussed and disseminated to defame and coerce petitioner, and were based on charges of dishonesty(P Ex 9);

unrevealed audit report conclusions, unrevealed mortgagee complaints (T Ph p 47-48) and secret and unrevealed charges of "equity skimming" which under 12 USC S1709-2 is defined as "fraud" (T Ph p 60-67). (Apx pB6) Nothing came of said audit, nor of said "equity skimming" investigation and mortgaee complaints were not made known to Sutton until after we had been removed from the fee appraiser panel (P Ex 9) ATL v, Inc. v U.S. 736 F2d 677 (Fed Cir 1984) Squarez v Weaver 484 F2d 678 (7th Cir 1973.

Said secret charges of "equity skimming", unrevealed audit reports, and unrevealed mortgagee complaints were not contained in the nonrecertification letter (P Ex 9) dated May 14, 1987 and thus consideration of any reasons outside of those contained in the above mentioned letter was a violation of

petitioner's due process rights Ex parte Bain 121 U.S. 1, 13 (1886) Stirone v U.S. 361 U.S. 212 In Re Ruffalo 390 U.S. 543, Note B (1968).

Respondent makes reference to collection of rents from property he owned during the time in which he was a debtor in bankruptcy. Petitioner asserts he was entitled to collect rents as a debtor in possession in bankruptcy; furthermore, he did so under the supervision of the trustee in bankruptcy and under approval of the bankruptcy court (P Ex 17; T Ph p 65-66); 11 USC 1107; (Apx pB6-B9); Perez v Campbell 401 U.S. 637 (1971) In re Water Gap Village 59 B>R> 23 (Bkrtcy D.N.J. 1985).

Petitioner's liberty interest and right to due process were violated in this case when the false allegations. Which were ultra-vires in purpose were

based on public and secret charges of fraud and dishonesty and made public, discussed and disseminated to punish, coerce, and defame petitioner (Apx pB11-B12). Said charges were made public, discussed and disseminated to:

A) The Staff members (T Tr p 24) that respondent Lange got advice from; the person who drafted Plaintiff Exhibit 9 (T Tr p 26-27); and the person who signed the May 14, 1987 letter (P Ex 9, 20) "for" Kenneth Lange (T Ph p 40-43; Apx pA16-A17)

B) The mailing of the termination letters (P Ex 5, 7, 9) thru the U.S. Mails. Subject mailings were thus made public to Postal Inspection Authorities and possibly to other Governmental Agency(ies) review, discussion, copying and forwarding (T Ph p (40-43; Apx pA16-A17)

C) The placement of said exhibits 5, 7, 9 in HUD's internal files and in Sutton's [personnel file , which are subject to HUD personnel review, discussion, copying and forwarding (Apx pA16-A17) Wellner v Minnesota State Junior College Board 487 F2d 153 (8th Cir 1973).

D) The unauthorized copying, forwarding, aiding, abetting and continuing spreading of the false and ultra-vires allegations based on charges of fraud and dishonesty when respondent had no legitimate basis for believing that such disclosure was authorized by law (T Ph p 54, 57, 59, 62; Apx pA16-A17) in violation of Covert v Harrington 876 F2d 751 (9th Cir 1989) Paul v Davis 424 U.S. 693 (1976)>

E) The understandable requirement and necessity that Sutton make public said

false and ultra-vires allegations based on secret charges of dishonesty and fraud (P Ex 20), because Sutton is required to list HUD on his resume and also then try to explain his financial disclosure statement showing a negative cash flow from the lost of the $63,510.00 annual appraisal fees for the period May 1, 1986 thru April 30, 1987 ($5,292.50 Monthly since May 1, 1987) (Apx pA16-A17; T Ph p 13-18; P Ex 19) and his unilateral dismissal from the fee appraisal panel to those current contracting entities that are part of HUD 's referral system, prospective private contracting businesses or person(s) and other governmental agencies(T Ph 40-43; Apx pA16-A17) Old Dominion Dairy Products, Inc. v Secretary of Defense 631 F2d 953, 963, 966 Note 24 (D.C. Cir 1980) Greene v

McElroy 360 U.S. 474, 475 Note D (1959) Morton v Ruiz 94 S Ct 1055, 1056 Note 7 (1974).

F) The real and potential prospect and chance that HUD will or has release said false and ultra-vires charges based on allegations of fraud and dishonesty to prospective employers contributing to the continuing spreading and publication process (Apx pA16-A17) Lefkowitz v Turley 414 U.S. 70, 83-84 (1973) Larry v Lawler 605 F2d
954, 958 (7th Cir 1978) id. Old Dominion . . . . . All of the above actions by respondent made and continues to make it impossible for petitioner to retain contracts that were in existence or to obtain other employment or contracts(sis) because HUD charges of "unprofessionalism in dealing with the public", as defined by HUD in

petitioner's Ex 7. Thus HUD's action has destroyed and will continue to destroy petitioner's reputation as a competent and capable real estate Appraiser, Broker, Property Manager and other related profession for contractor related work or contracts that petitioner might bid or apply for. (Apx pA16-A17)

QUESTION II - ARBITRARY AND CAPRICIOUS

Petitioner herein adopts and incorporates all of the allegations contained in the previous parts of this Writ of Certiorari as fully as if fully set forth verbatim herein.

Substantively, agency action may not be set aside unless the court finds such action to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law Frisby v U.S. Dept. of HUD 755 F2d 1052, 1055 (3rd Cir 1985).

There is on relevance, connection or "nexus" between appraisal services and borrowing activities (Apx pA19-20, Footnote 7) Bonnet v U.S. Postal Service 661 F2d 1071, 1072 (5th

Cir 1981) D.E. v Dept. of the Navy, MSPB 721 F2d 1164 (9th Cir 1983) Gloster v GSA 720 F2d 700 (D.C. Cir 1983).

In subject case, every other person not recertified to the fee appraiser panel at anytime, both prior to and at the time Mr. Sutton was not recertified, were not recertified based on failings of performance as an appraiser (T Tr p 28 & Def Ans Interogs #1).

Mr Sutton may possibly be barred from borrowing, on a case-by-case basis, due to his credit history; but certainly he can not be barred from being an appraiser simply because of inability to pay his debt. This is especially true since the cost of the appraisal fees are not borne by HUD, nor the lender, but instead are prepaid by the buyer or seller into the lender's escrow account

(P App Ct. Brief-p6) and because "THERE IS NO LEGAL RELATIONSHIP BETWEEN THE FHA AND THE INDIVIDUAL MORTGAGOR" (T Ph p 11, 12, 29, 30) (FHA and HUD are the same agency) U.S. v Neustadt 366 U.S. 696, 709 (1961) Warren v Government Nat. Mtg. Ass'n. 611 F2d 1229, 1235 (8th Cir 1980) Cert. Denied 449 U.S. (1980) Aetna Cas. and Sur. Co.v U.S. 655 F2d 1047, 1048 Note 6 & 7 (U S Ct Cl)

Respondent argues that HUD's action is supported by 42 USC S3535(d) and 24 CFR 200.210. (Apx pB14-15)

HUD Statute 42 USC S3535(d) , as drafted and as construed by HUD, the District Court, and The Court of Appeal is unconstitutional vague on its face within the meaning of due process and is arbitrary and capricious. Kolender v Lawson 461 U.S. 352 (1983) id. Greene v McElroy; Alcoa Steamship Company v

Federal Maritime Commission 348 F2d F2d 756 Note 2 (D.C. Cir 1965)

As such, 42 USC S3535(d) as drafted and as construed by HUD, the District Court and the Court of Appeal vest virtually complete discretion in the hands of HUD to "statutory discriminate" between two like classes of fee appraisers in deciding which fee appraisers are entitled to and which ones are not entitled to the notice, hearing and procedural requirements of due process in accordance with the Administrative Procedures Act, 42 USC 3535(d) and (o), the HUD Handbook 4020.1 and subsequent change 5, the HUD Memorandum, 24 CFR 10.1 -10.20 and 24 CFR 24 (Apx pB14-15, Footnote 4).

In subject action, HUD is attempting to rationalize the "statutory discrimination" by assigning different

labels of "unprofessionalism in dealing with the public" and "unsatisfactory performance" to justify statutory discrimination between the "same class of fee appraisers" (Apx p.A6,A8,A13, Footnote 4).

According to the Opinions below, "termination, suspension and debarment" from the fee appraiser panel for "unsatisfactory performance" would entitle said class of fee appraisers to the notice, hearing and due process procedural requirements of the previously identified HUD rules, regulations, handbook, memorandums and statutes . . . but, said opinions below also attempts to rationalize that an appraiser "terminated, suspended or debarred for "unprofessionalism in dealing with the public", is-not entitled to those same procedural due

process requirements as the appraiser who is disciplined for the "unsatisfactory performance" identified above (P Ex 7; 11, p 1-10, Sec 1-12e; Apx pa6,A8,A13, Footnote 4) Richardson v Belcher 404 U.S. 78, 83, 92 (1971) Fowler v U.S. 633 F2d 1258, 1263 Note 1 & 5 (8th Cir 1980).

In petitioner exhibit 7, respondent in 3 separate places informs petitioner that he is "Terminated" as well as not recertified.

Said summary termination, breach of contract, suspension, and debarment from future fee appraising contracts was "absent procedural regulations authorizing or governing debarment from participation in contracts . . . promulgated in accordance with Administrative Procedure Act and absent notice, hearing and findings, debarment

was invalid" (P Ex 5, 6, 7; T Ph p 37: Def Interogs # 18) id. Gonzalez; Allison v Block 723 F2d 631, Note 1 (8th Cir 1983) 42 USC S3535(o).

Respondent indicates that "HUD expects that fee appraisers as participants in its programs be responsible individuals 'who will honor their legal, financial and contractual obligations...'" Said statement comes from the Code of Federal Regulations, cited by respondent as 24 CFR Sec 200.210 (4-1-86 edition).

Petitioner points out then that said Code which sets forth reasons for termination, debarment or suspension, does-not contain any of the causes enumerated by HUD in its letter to petitioner (P Ex 9; T Tr p 23) Ex parte

Bain 121 U.S. 1, 13 (1886) Stirone v U.S. 361 U.S. 212 In re Ruffalo 390 U.S. 543 Note B (1968).

Further, respondent failed and refused to follow the procedural requirements of 24 CFR 24 which are incorporated and made a part of 24 CFR Sec 200.210 (P Ex 7, Def Ans Interogs #18; Apx pA9-A10, Footnote 3; Apx pA13, Footnote 4).

Thus respondent actions are cruel and unusual punishment inconsistent with contemporary standards of "decent and fair play" and repugnant to the conscience of mankind in violation of the 8th amendment to the U.S. Constitution and constitute an unnecessary and wanton infliction of punishment in violation of petitioner's due process rights.

Respondent(s) action(s) thru-out this process has been a violation of the A.P.A., 18 USCA S 1951-The Hobbs Act, The RICO Act, and the Debt Collection Act (P Ex 9, 20; T Tr p 21, 28; T Ph p 57, 60-63).

Clearly then HUD's actions are arbitrary, capricious, an abuse of discretion and not in accordance with law id. Frisby. Thus Petitioner has met all of the requirements for a preliminary and permanent injunction (T Ph p 65) as required by id. Johnson v U.S., Mayo v Lakeland Highland Canning Co. 309 U.S. 310 (1940), Oldroyd v Kugler 461 F2d 535 (3rd Cir 1972).

Respondent actions are arbitrary and capricious because of the HUD's Office Manager threat that "under any circumstances your request for reinstatement is premature given your

pending lawsuit against us". Said threat by the Office Manager burdened and chilled petitioner's constitutional rights of access to courts, even if threat was not actually effective and was arbitrary and capricious (P Ex 20) Silver v Cormier 529 F2d 161 (10th Cir 1976).

HUD cannot make an otherwise unconstitutional requirement and/or invalid proviso, such as "under any circumstances your request for reinstatement is premature given your pending lawsuit against us", a condition to the granting of recertification (T Ph p 37; P Ex 20) Standard Airlines v Civil Aeronautics Board 177 F2d 18, 20 notes 2, 3 (D.C. Cir 1949) id. Richardson, Fowler.

RELIEF REQUESTED

Therefore, petitioner request the Court to issue a permanent injunction prohibiting the respondents, their agents, successors, employees, attorneys, and those acting in concert with them from failing to recertify petitioner as a member of said fee appraiser panel for any reason other than factors relating to his performance as an appraiser and only then in accordance with the procedural requirements of due process. (Apx pB14-B15)

Petitioner request that the court declare that HUD Statute 42 USC S3535(d) and (o) is unconstitutionally vague on its face within the meaning of due process and arbitrary and capricious and thus is unlawful, null and void and that

the procedures employed by HUD in subject case and in similar circumstanced cases deprived petitioner and similiar class of petitioners of property and liberty rights and interests in violation of due process of law, because there is no "nexus" between Petitioner's appraisal services and his borrowing activities as an "mortgagor".

Petitioner request that the Court declare that the Office Manager threat (P Ex 20) chilled and burdened petitioner's access to Court because it was done in bad faith, was ultra vires in motive and was done with the intent to punish, defame and coerce petitioner in violation of his right to due process. 5th, 8th and 14th Const Amend, APA, 42 USC S 3535(d) and (o), 24 CFR 200.210, 24 CFR 24, 24 CFR

10.1-10.20, HUD Handbook 4020.1 and subsequent Change 5, HUD Memorandum.

Petitioner request that the Court declare that respondents actions created a statutory discrimination between two like classes of fee appraiser and that said statutory discrimination cannot be rationalize by assigning the reasons of "unsatisfactory performance" and "unprofessionalism in dealing with the public" a different label to justify why one is awarded all of the procedural protections of due process and the other is awarded none.

Petitioner request that the Court declare that the Secretary of HUD is required to promulgate both procedural and substantive regulations for nonrecertification of fee appraisers.

Petitioner request that the Court declare that pursuant to Rule 19 and 21

of the F.R.C.P. that William Krueger, auditor with the Inspector General's Office of HUD has been joined as a co-party defendant in this action because said William Krueger who has previously entered a voluntary appearance in this case (T Ph p 54), is a necessary defendant in which HUD has been named as a defendant and has interposed a defense. Further said defendant will-not be prejudiced, nor will the Court be deprived of jurisdiction, nor will the joining of William Krueger require any retrial of the issues.

Petitioner request that the Court declare and order that respondent, their agents, successors, employees, attorneys, and those acting in concert with them annually recertify petitioner as a member of said fee appraiser panel

for the consecutively and annually uninterrupted period of May 1, 1987 thru the end of the current period of time in which this court enters it order Greene v U.S. 376 U.S. 149 Note D.

Petitioner request that the Court grant petitioner (1) compensatory damages in excess of $5,292.50 per month (appraisals fees increases in 1987 from $175.00-$200.00 per appraisal to $225.00 per appraisal) prorated to the actual date of recertification, from the 1st day of May 1987 to the date of recertification, plus interest and (2) fair and reasonable punitive damages against each of the individual respondents in an amount in excess of $3,000,000.00 and other equitable relief deemed proper under the circumstances of this case.

Petitioner request that the Court award petitioner his costs of this action, together with reasonable attorney's fees, and a directed verdict for the petitioner or for a judgement notwithstanding the verdict in petitioner favor.

Finally, if this Court finds that it is not disposed to rule on any of the issues presented or that for any reason this Writ of Certiorari is imperfect in any manner, petitioner request that he be allowed to amend same under the liberal amendment provisions of 28 USC S1653 or other provisions or authorities that this court considers to be equitable.

CONCLUSION

In conclusion, for the reasons argued above, the applellant states that the verdict of the court was against the weight of the evidence and contrary to the law as (1) defendant had violated plaintiff's right to due process in failing to give substantive notice and a hearing prior to termination of plaintiff's membership from the private fee appraiser panel and (2) defendant's action in terminating plaintiff from the private fee appraiser panel was arbitrary and capricious. Therefore, the court should reverse the agencies action, order plaintiff reinstated to the private fee appraiser panel, and award appellant damages, attorneys fees and costs.

PETITIONER'S AFFIDAVIT OF SERVICE OF WRIT OF CERTIORARI

Upon Respondent(s)

and upon

Solicitor General, Department of Justice, Washington D.C. 20530.

I, the undersigned petitioner do solemnly state on oath of affirmation that I have served a copy(ies) of subject Writ of Certiorari, in accordance with "Rules of the Supreme Court of the Unites States(Adopted April 14, 1980; Effective June 30, 1980; Including Revisions of November 21, 1980) on the Solicitor General, Department of Justice at the above noted address and to Respondent(s) Attorney

Joseph B. Moore, Assistant U.S. Attorney, at his office 1120 Market Street-Suite 414, St. Louis, Missouri 63101 on this 17th day of December 1989. Said service to the Solicitor General and To the U.S. Attorney was done by certified mailing thru the U.S. Postal Service return Receipt requested.

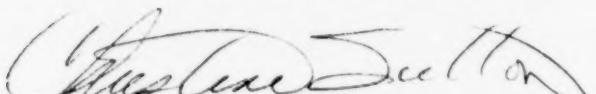
Emerson Sutton

2141 Yale

Maplewood, Missouri 63143

(314) 781-2222

Subscribed and sworn to before me this 17th Day of December 1989.



Notary Public

State of Missouri

County of St. Louis

My Commission

Expires 4-11-92

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2257

Emerson Sutton.	•	
Appellant,	•	
	•	
v.	•	Appeal from the
	•	United States
	•	Court for the
United States	•	Eastern District
Department of	•	Missouri.
of Housing &	•	
Urban Development:	•	
Kenneth D. Lange:	•	
Charles H. Hopkins.	•	
	•	
	•	
Appellees.	•	

Submitted: April 14, 1989

Filed: September 19, 1989

Before BOWMAN, Circuit Judge, ROSE, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Emerson Sutton appeals the District Court's[1] decision that he is not entitled to relief on his claim that the Department of Housing and Urban Development (HUD) violated his due process rights and acted arbitrarily and capriciously when it did not recertify him as a panel fee appraiser for HUD insured mortgages. We affirm.

I.

HUD maintains a list of private fee appraisers, who are appointed for one-year terms to perform appraisals of property purchased with HUD-insured mortgages. When a lender seeks HUD insurance on a proposed mortgage loan, HUD requires that the subject property

---

[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

be appraised by one of the appraisers on the list. HUD then assigns the appraisal job on a rotational basis to an appraiser on their list. Although the appraisers are not federal employees and generally perform only two or three appraisals per month, their activities as certified fee appraisers can generate substantial income.[2] Appellant was certified as a member of the private fee appraiser panel on May 1, 1971. He was recertified to serve on the panel for each year thereafter through April 1987. By letter dated April 21, 1987, Charles H. Hopkins, Chief of the HUD valuation branch, informed appellant that he would not be recertified for appraisal services effective May 1,

---

[2] During the panel year May 1, 1986 through April 30, 1987, appellant earned $63,510 from his activities as a HUD certified fee appraiser.

1987, and advised him of his right to meet with Hopkins to discuss his nonrecertification and his right to appeal to the Office Manager, Kenneth Lange. On April 23, 1987, Appellant wrote Lange, asking for a delay and reconsideration of the May 1 nonrecertification, for certain documentation, and for a meeting with the Branch Chief. Lange replied by certified mail on April 29, 1987, denying the request for delay and advising appellant of the status of the document request. In response to a second letter from appellant, Lange wrote to him on May 14, 1987, stating:

> You were not recertified as a fee appraiser because of your repeated and continuous engagement in a course of conduct that is prejudicial

> and damaging to the interests of this Department. This conduct concerns your wrongful possession and use for your own personal benefit and gain properties at 4214 Marlin Drive and 8417 St. Olaf, St. Louis, Missouri, and the rents derived therefrom after these properties were foreclosed and conveyed to the Secretary of Housing and Urban Development.

Plaintiff's Exh. 9. After responding to appellant's requests for documents, Lange concluded the letter by asking appellant to "Please contact me, at your convenience to schedule a meeting to discuss your nonrecertification."

Appellant did not correspond further with HUD in regard to the offered meeting. instead, he filed the instant suit in federal district court, seeking to compel his recertification. After a hearing on appellant's request for a preliminary injunction and a trial on the merits, the District Court entered judgement in favor of appellees. This appeal followed.

II.

Appellant argues that his due process rights were violated by HUD's action in refusing to recertify him to the private appraiser panel without notice and a hearing. Because we conclude that appellant's interest in recertification is not within the range of property and liberty interests

protected by the due process clause, we must reject this argument.

It is well established that "{t}he requirements of procedural due process apply only to the deprivation of interests encompassed by the {Fifth} Amendment's protection of liberty and property" and that "the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth 408 U.S. 564, 569-70 (1972). Thus, to invoke procedural due process protections, appellant must have either a property or a liberty interest in being recertified to the private fee appraiser panel.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate

claim of entitlement to it." Roth, 408 U.S. at 577. Although appellant's complaint filed in the District Court alleged that he had been "deprived of his property rights without due process of law",' he has not at any time either before the District Court or before this this Court made any attempt to identify the source of that asserted right. SEE Roth, 408 U.S. at 577 ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits."). Appellant has not proved that any claim of entitlement is legitimate in light of the policies and practices of HUD with regard to the composition and maintenance of the private fee appraiser panel. See Perry

v. Sindermann, 408 U.S. 593, 603 (1972). Instead, appellant argues in conclusory terms that his due process rights were violated by HUD's failure to provide "prior substantive notice of charges and reason for removal and . . . a prior evidentiary hearing. See Plaintiff"s Proposed Findings of Fact and Conclusions of Law at 5; see also Appellant's Brief at 13-14.[3]

Appellant's failure to point to

---

[3] The District Court entered judgement in favor of the appellee without any explicit consideration of appellant's constitutional due process claim. Instead, that Court considered only whether HUD's failure to comply with its own procedures warranted relief for appellant: "While it appears that plaintiff was entitled to a written notification of the reasons for his removal prior to expiration of his certification, this omission alone cannot support a successful action against any of the defendants where plaintiff's non-recertification was justified and where the defendants provided him with notice of their action prior to its effective date. Plaintiff
*** Continued on next page

any source of his alleged property right in his status as a panel fee appraiser for HUD is reason enough for our affirmance of the District Court.s adverse judgment on appellant's due process claim. In addition, our gratuitous review of the agency documents governing fee appraiser panel-- a review that owes nothing to anything in appellant's briefs or argument-- leads us to conclude that no such property interest exists. First, we find it significant that membership on the panel does not amount to government employment; rather, it simply

---

Footnote continued --
had the opportunity to meet with defendant Hopkins prior to the expiration of his certification and, in any event, he was informed of the major reasons for the action soon after his certification expired." Sutton v HUD, No. 87-0963 C (5), memorandum op. at 5-6 (E.D. Mo. July 18, 1988).

represents the opportunity to do business with those seeking government-insured mortgages. The panel is constituted, on a year-to-year basis, merely to provide a pool of approved appraisers to perform work not for the government (although an authorized appraisal is required to obtain HUD insurance on a mortgage) but for private entities seeking to do business with the government. The HUD handbook which sets out the procedures applicable to HUD's maintenance of fee appraiser panels is instructive. Section 1-12(b) of that handbook provides that:

> Appointments by designation are the responsibility of the Branch Chief and must be for only a year at a time. At the end of the year the selecting official may

determine they will not be recertified. This decision must be based on documented evidence that performance does not warrant continued panel membership. Factors to be considered in performance standards include technical competence, co-operation, timeliness of work, and professionalism in dealing with the public. Removal must be preceded by written notification of the reason for the decision.

HUD Handbook 4020.1 (Aug. 17, 1984 revision). This section makes clear that the term of appointment is limited to one year, and that the selecting

officials are vested with discretion, albeit somewhat limited, to determine whether an appraiser should be recertified from year to year. Moreover, subsection (e) of that same section in the handbook notes that the nonrecertification of a panel member is not suspension or debarment and therefore the appeal procedures set out in the Code of Federal Regulations for those kinds of agency action do not apply to this situation.[4] Rather, a panel member notified of nonrecertification has the right to meet with the Branch Chief and discuss the decision if he so desires, and then to appeal to the office manager or his

---

[4] In contrast, subsection (d) states that the termination of membership on the panel(as opposed to the nonrecertification) must be done strictly according to the procedures found in 24 C.F.R. Part 24 for unsatisfactory performance.

designee. Given the non-permanent structure of the panel and the broad discretion vested in agency officials to determine whether panel members will be recertified. we do not believe that the procedures set out in the handbook create a property interest.[5] See Hill v. Group Three Housing Development Corp., 799 F.2d 385,392 (8th Cir. 1986). We conclude that appellant had no property interest in continuing membership on the private fee appraiser

---

[5] Nor does a memorandum prepared by HUD official further limit agency discretion so as to create a property interest. Although the memo states that "no fee member should be removed from the panel unless there is substantial evidence in the file of untimeliness, uncooperativeness or less than acceptable performance," it also states that the handbook provision we discuss in the text "covers panel appointments, removal, and the reduction of the size of the panel."

panel, and thus no constitutionally protected claim of entitlement to recertification.

In holding that appellant has no property interest in these circumstances, we find instructive those cases holding that citizens suspended from doing business with the government have no constitutionally protected property interest in obtaining government contracts. See, e.g. ATL, Inc. v. United States, 736 F2d. 677, 683 (Fed. Cir. 1984), Transco Security, Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981); Gonzalez v Freeman, 334 F2d 570, 574 (D.C. Cir. 1964).

Appellant relies on Gonzalez to argue that his predicament here is equivalent to the debarment there and, belatedly, in his reply brief, that his

liberty interest was implicated. The Court in ATL, Inc. noted that a bidder who lacks a property interest in a government contract might still have a liberty interest at stake "where the suspension is based on charges of fraud and dishonesty." 736 F.2d at 683 (footnote omitted). Appellant contends that the agency decision here results from charges of that sort. We disagree.

By refusing to recertify appellant to the private appraiser panel, HUD did not "make any charge against him that might seriously damage his standing and associations in his community." See Roth, 408 U.S. at 573. In Roth, the Supreme Court noted that a governmental decision not to rehire an employee does not necessarily impose on him a "stigma or other disability that foreclose[s] his freedom to take advantage of other

employment opportunities." Id. In the same vein, HUD's decision not to recertify appellant to the panel membership was not his only professional endeavor. The nonrecertification, the reasons for which were not made public, does not impose a stigma or foreclose him from seeking appraisal work outside the HUD referral system. See Bishop v Wood 426 U.S. 341, 348 (1976).

We hold that appellant has failed to demonstrate that the agency's decision violated any of his due process rights.[6]

---

[6] This is not to say that the agency was not obligated to follow its own procedures, as set out in the HUD handbook, in effecting nonrecertification. The agency's failure to apprise appellant of the reasons for his nonrecertification before the effective date thereof appears to be a technical violation of those procedures. We do not believe,
*** Continued on next page

III.

Appellant's second argument for reversal is that HUD's decision not to recertify him to the appraisal panel was arbitrary and capricious. We find no merit in this argument.

Our scope or review in a situation in which, as here, an agency has exercised discretion on a matter that lies within its competence is to determine whether the agency has exceeded statutory authority, has acted arbitrarily, or has failed to follow the necessary procedural requirements. See Citizens to Preserve Overton Park v.

Footnote continued --
however, that this failure provides a basis for relief, since appellant was offered the opportunity to meet with the branch chief prior to the effective date of his nonrecertification, was given reasons for the decision soon thereafter, and chose to litigate rather than pursue agency procedures.

Volpe, 401 U.S. 402, 415-16 (1971); Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 713 (8th Cir. 1979); 5 U.S.C. S706. "Agency action may not be set aside on grounds that it is arbitrary and capricious if the action is rational, based on relevant factors, and within the agency's statutory authority." Frisby v HUD, 755 F.2d 1052, 1055 (3d 1985) (citation omitted).

We hold that HUD's decision not to recertify appellant was not arbitrary or capricious. The manner in which appellant conducted his real estate business, particularly with regard to properties on which HUD had foreclosed,[7] certainly placed him in an awkward position vis-a-vis the

---

[7] HUD brought an unlawful detainer action against appellant with regard to the St. Olaf property and received possession of the property pursuant to a

*** Continued on next page

lending institutions and others he worked with as a member of the fee appraiser panel. We believe that HUD justifiably found that appellant had not exhibited "professionalism in dealing with the public," which, under Section 1-12(b) of the handbook, warranted a decision that he not be recertified. Thus, because the agency's action was rational, based on relevant factors, and

---

Footnote continued -- settlement of that action. See Appellant's Exh. 18; Appellant's Reply Brief at 9. In addition, between December 1984 and October 1986, appellant filed three petitions in bankruptcy for Chapter 11 reorganizations, none of which resulted in a successful reorganization. These bankruptcies involved several properties on which appellant was in default to lending institutions. As member of the private fee appraiser panel, appellant was assigned to perform appraisals that were used by those same lending institutions. See Trial Transcript at 25.

within its authority, we conclude that it may not be set aside as arbitrary or capricious

the judgement of the District Court is AFFIRMED.

A true copy

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EMERSON SUTTON,)

Plaintiff,)

vs.)

UNITED STATES DEPARTMENT)
HOUSING AND URBAN)
DEVELOPMENT, KENNETH D.)
LANGE and CHARLES H.)
HOPKINS,)

Defendants.)

MEMORANDUM OPINION

Findings of Fact.

This case was submitted after a trial on the merits before the Court. The parties have stipulated that all testimony and exhibits reserved as evidence at a previous hearing on a preliminary injunction are admissible. The plaintiff testified at the preliminary injunction hearing, but did

not offer additional testimony at the trial. Plaintiff's original testimony was to be used at this final hearing on the merits. Kenneth Lange and Charles Hopkins, the individual defendants, testified at the trial.

The evidence was substantially the same at trial as that adduced at the preliminary hearing. Plaintiff, a black male, for many years had been annually certified as a panel fee appraiser by the St. Louis Area Office of the Department of Housing and Urban Development. His annual appointment was made pursuant to HUD Handbook 4020.1. As a fee Appraiser, plaintiff made appraisals of residential property for private lending institutions(mortgagors). The Department requires lenders to submit the Fee Appraiser's property is randomly

assigned for a particular mortgage insurance application in the order in which his name appears on the panel list. There are approximately 85 names on the list at present. The mortgagee has no option but to employ the assigned appraiser and it is the mortgagee, not HUD, which pays the appraiser's fee.

By letter dated April 21, 1987, plaintiff was informed by defendant Charles H. Hopkins, the Branch Chief, that HUD "will not recertify you for appraisal services," effective May 1, 1987. The letter did not provide a reason for plaintiff's non-recertification but stated merely that the decision was "based upon factors that indicate it is to the benefit of the agency.***" Plaintiff was advised that he had the right to meet with Hopkins to discuss the matter

with a right of appeal to the Office Manager, Kenneth Lange, or his designee.

On April 23, 1987, plaintiff wrote to Lange asking for a delay in the expiration of his certification as well as reconsideration of the decision itself. He requested all written, verbal or other documentation used as a basis for the non-recertification and asked for a meeting with Hopkins. Defendant Lange responded to plaintiffs letter by correspondence dated April 29, 1987, in which he denied the requested delay, advised that a meeting with Hopkins would be afforded, and counseled plaintiff on the status of his records request.[1] In a letter dated May 2, 1987, plaintiff challenged the validity

---

[1] Defendant Lange also advised plaintiff that, contrary to plaintiff's view, the determination not to recertify him was not subject to HUD regulations at 24 C.F.R., Part 24.

of the department's action and demanded an explanation of the "factors" which were the basis of HUD's decision. On May 14, 1987, Lange wrote plaintiff and, for the first time, informed him that he was not recertified because of a repeated course of conduct prejudicial and damaging to the interests of the department. Lange cited plaintiff's possession of two residential properties that had been foreclosed and conveyed by the trustee to HUD, but which plaintiff as mortgagor refused to surrender. Lange also had other information at that time that he chose not to reveal in his May 14th letter. At trial he testified that he received complaints from mortgagees for whom plaintiff performed as a fee appraiser on HUD insured deals, and who held mortgages in default in which plaintiff was the mortgagor.

Plaintiff does not deny that he owned as many as 31 residential properties on which mortgages were in default to mortgagees to whom he was assigned as the HUD fee appraiser. Plaintiff also does not dispute that he continued to hold two properties and collected their rents after foreclosure. As to these, however, plaintiff contends that he was entitled to do so as the debtor in possession under Chapter 11 of the Bankruptcy Code. Lange and William Krueger of the HUD Inspector General's Office, also knew that plaintiff was under investigation for alleged "equity-skimming" under 12 U.S.C. §1709-2 but Lange chose not to reveal this to plaintiff.

In addition to his work as a fee appraiser, plaintiff had operated his own real estate company for a number of

years in which be brokered as well as purchased and sold various properties. Plaintiff's first Chapter 11 Bankruptcy, case No. 84-02188(1), was filed in the Eastern District of Missouri on December 27, 1984. The schedules listed 8417 St. Olaf as subject property. HUD had insured the mortgage on this real estate and plaintiff was the mortgagor in default. The property was foreclosed according to the Trustee's notice on December 27, 1984 "between the hours of 9:00 O'clock A.M. and 5:00 O'clock P.M. (12 Noon)." Plaintiff argued that his Chapter 11 petition was timely filed so as to permit him to remain in possession with the right to collect rents on the St. Olaf property. The evidence showed, however, that his bankruptcy petition

was filed at 4:55 P.M. on December 27, several hours after a successful foreclosure.

Plaintiff's Chapter 11 petition listed secured properties worth $2,032,000.00 with $1,462,959.00 in indebtedness. On February 12, 1986, Bankruptcy Judge Brauer dismissed plaintiff's petition for willful failure to abide by orders of the Court. Shortly thereafter, plaintiff filed another Chapter 11 petition on April 8, 1986, case number 86-00812(2). That petition was dismissed by Judge McDonald on April 18, 1986 because it was filed within 180 days of the dismissal of the first petition, a violation of U.S.C.§109(g)(2). Plaintiff filed a third Chapter 11 petition on October 21, 1986, case number 86-02634(3), before Judge Schermer. A disclosure statement

and plan of reorganization were filed on December 11, 1986 by the plaintiff. By order entered February 4, 1987, Judge Schermer denied approval finding the disclosure statement to be insufficient and similar to the statement filed in the first Chapter 11 proceeding which Judge Brauer found to be "woefully inadequate." Upon the debtor's motion, this petition was dismissed on March 20, 1987.

Faced with above recited history, defendant Lange formed an ad hoc committee comprised of Will Mackin, Charles Hopkins, Lynn Steele and himself to review the panel of fee appraisers up for recertification during the year commencing May 1, 1987. Lynn Steele is Lange's deputy and is a member of a racial minority (black). The committee concluded that six fee appraisers,

including Mr. Sutton, should not be recertified. Two of the six, including the plaintiff, were black. Four were white. The government offered no evidence that the quality of plaintiff's appraisal work was below standard.

Conclusions of Law

Plaintiff has set forth a number of jurisdictional bases in support of his claims, some of which appear to be in doubt. Plaintiff's citation of U.S.C.§1346(a)(2) as a basis for jurisdiction appears to be inappropriate since he is requesting far more than the $10,000.00 limit allowed under that statute. The all writs statute, 28 U.S.C.§1651, does not confer jurisdiction upon a federal district court but rather provides a means by which a court may enjoin state actions where necessary to prevent relitigation

of an existing federal judgement. In Re Baldwin-United Corp., 770 F.2d 328, 335 (2nd Cir. 1985). Many of the other cited statutory provisions advanced in plaintiff's complaint, as providing a basis for jurisdiction, are similarly inappropriate or inapplicable to the facts of this case. Nevertheless, plaintiff's claim under 42 U.S.C.§2000d (Title VI) is clearly appropriate. In addition, although not cited by plaintiff, the Court believes jurisdiction over HUD could be asserted under 5 U.S.C.§702 of the Administrative Procedures Act.

As to the claim of racial discrimination regarding HUD's decision not to recertify plaintiff as an appraiser, the Court has determined that the evidence overwhelmingly shows that defendants' actions were based on

factors other than the plaintiff's race. It was clear at trial that both of the individual defendants were motivated by plaintiff's ownership and dealings with certain HUD insured property in making their decision not to recertify him.

In regard to the propriety of defendants' non-recertification of plaintiff, the Court holds that decision was also justified under the circumstances of this case. The department has established certain factors to be utilized in evaluating fee appraisers who are up for recertification. HUD Handbook 4020.1 provides at page 1-9 that:

> b. Appointments by designation [of fee appraisers] are the responsibility of the Branch Chief and must be for only a year at a time. At the end of

the year the selecting official may determine they will not be recertified. This decision must be based on documented evidence that performance does not warrant continued panel membership. Factors to be considered in performance standards include technical competence, cooperation, timeliness of work and professionalism in dealing with the public. Removal must be preceded by written notification of the reasons for the decision.

The language of this section does not limit the factors to be considered by the department to those outlined. Nevertheless, the fact that plaintiff had performed fee appraisals on property

on which he was the defaulting mortgagor would by itself constitute a clear lack of professionalism as envisioned by the handbook. In addition, HUD's actions can be justified by reference to 24 C.F.R.§200.210 which states:

> it is the Department's policy that participants in its housing programs be responsible individuals and organizations who will honor their legal, financial and contractual obligations.....

Given plaintiff's course of conduct with regard to his defaults on HUD insured property, the department and the individual defendants acted properly in denying plaintiff his recertification. Further, pursuant to 42 U.S.C. 3535(d), the Secretary of Housing and Urban Development has broad discretion in

managing and delegating duties within the Department. While it appears that plaintiff was entitled to a written notification of the reasons for his removal prior to expiration of his certification, this omission alone cannot support a successful action against any of the defendants where plaintiff's nonrecertification was justified and where the defendants provided him with notice of their action prior to its effective date. Plaintiff had the opportunity to meet with defendant Hopkins prior to the expiration of his certification and, in any event, he was informed of the major

reasons for the action soon after his certification expired.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for leave to join the Secretary of Housing and Urban Development is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of the defendants.

Dated this 18th day of July, 1988.

SIGNED

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1989

(CASE #89-976)

EMERSON SUTTON

Petitioner

vs.

United States Department of Housing & Urban Development; Kenneth D. Lange; Charles H. Hopkins; Secretary of Housing and Urban Development(Appendix Page); William Krueger, Auditor with the Inspector General's Office of HUD (T.PH.P.54) Pursuant to Rule 19 and 21 F.R.C.P.

Respondent

SUPPLEMENTAL BRIEF (REF S CT Rule 22.6)

To the United States Court of Appeals

For the Eight Circuit

Emerson Sutton, Petitioner
2141 Yale
Maplewood, Missouri 63143
(314) 781-2222

THE QUESTION PRESENTED

Under U.S. Supreme Court Rule 22.6, the refusal of this Court to review Federal Statute 42 USC §3535(d) and other questions of law presented in the Petition for Certiorari and/or this Supplemental Brief, which quotes the U.S. Supreme Court cases of FW/PBS, Inc v Dallas (No 87-2012) and University of Pennyslvania v E.E.O.C. (No. 88-493), DECIDED IN JANUARY 1990, would be an obvious miscarriage of justice. Said refusal to review the lower courts decisions would be inconsistent with substantial justice, in direct conflict with cited legislation and case law and is so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this courts power of supervision.

U.S. Supreme Ct Rule 22.6; Federal Rules of Evidence, Rule 103(a)(1) 28 USCA; Fed Rules Civil Pro. Rules 46, 61, 28 USCA; Hormel v Helvering 312 U.S. 552, 556-557 (1941) under Mo S Ct Rule 3.27; Martinez v Mathews 544 F2d 1233 Note 4 (5th Cir 1976) Carlson v Green 100 S Ct 1468, 1469 Notes 1, 2 & 6 (1980).

TABLE OF CONTENTS

PAGE

Supplemental Brief
Cover Sheet.....ante - 1

Questions Presented.....ante - 3

Table of Contents.....ante - 5

Table of Authorities.....ante - 6

Further Jurisdictional Statement.... 1

Supplemental Brief.....3 - 10

Petitioner's Affidavit of Service of
Supplement Brief to the Respondent's
of the Petition For
Certiorari.....Apx 1

TABLE OF AUTHORITIES

Page

Alcoa Steamship Co. v Federal Martime Commission 348 F2d 756 Note 2 (D.C.Cir 1965).....5

Carlson v Green 100 S Ct 1469 Note 1, 2 & 6 (1980).....Ante-4

Cleveland Board of Education v Loudermill 470 U.S. 532, 533 (1985).....5,22

66 Corpus Juris Secundum Notice Sec. 14,P. 652.....10

Davis v Rodney 490 F2d 1360, 1362 (3rd Cir 1974).....2

Federal Rules of Evidence, Rule 103 (A)(1) 28 USCA.....Ante-4

Federal Rules Civil Procedures, Rule 103 46, 61, 28 USCA.....Ante-4

FW/PBS Inc. v Dallas (No. 87-2012) decided by the U.S. Supreme Court in January 1990.....Ante-3,1,4,9

Hoppe, Inc. v St. Louis Public Service Co 361 Mo 402, 235 S.W. 2d 347 (Mo En Banc 1951).....10

Hormel v Helvering 312 U.S. 552, 556-557 (1941).....Ante-4

Independent Meat Packers Association v Butz 526 F2d 228, 239 Note 30 (8th Cir 1975)

Certi. Denied 42 & U.S. 966.....6,8

In re Lewis 845 F2d 624, 625, 635.....7
Note 10 (6th Cir 1988) Rehearing
and Rehearing En Banc Denied
6-29-88.....7

Kolender v Lawson 461 U.S.
352 (1983).....9

Mar v Kleppe 520 F2d 867,
868 (10th Cir 1975).....2

Martinez v Mathews 544 F2d 1233
Note 4 (5th Cir 1976).....Ante-4

Missouri Supreme Court
Rule 3.27.....Ante-4

Missouri Teacher Tenure Act V.A.M.
S. 168.104 (OP. ATTY. GEN. NO. 233,
Holliday 10-24-72).....8,9

Morton v Ruiz 94 S Ct. 1055,
1056 Note 7 (1974).....4

In re Ruffalo 390 U.S. 543,
550 (1968).....6,8

Schware v Board of Bar Examiners
353 U.S. 232 Notes A&D (1957).....5

Standard Airlines v Civil
Aeronautics Board 177 F2d 18,
20 Notes 2 & 3 (D.C. Cir 1949).....9

Stirone v U.S. 361 U.S. 212.....6,8

University of Pennyslvania v E.E.O.C.
Decided by the U.S. Supreme Court in
January 1990.....Ante-3,1,3,4,7,8

U.S. Supreme Court Rule 22.6...Ante-4,1

(T = Transcript; PH = Preliminary Hearing; TR = Trial; L.F. = Legal Files; P Ex = Plaintiff's Exhibit; Apx = Appendix)

ADDITIONAL JURISDICTIONAL STATEMENT

This Supplemental Brief is invoked per the provisions of U.S. Supreme Court Rule 22.6 in which petitioner wishes to call the Court's attention to its January 1990 rulings, in the new cases of FW/PBS, Inc. v Dallas (No. 87-2012) and University of Pennsylvania v E.E.O.C (No. 88-493), which were not available at the time of Petitioner's filing of his Petition for Certiorari on December 18, 1989, and other cases and legislation which support said rulings.

Additional Jurisdiction of the District Court was invoked under 24 CFR 200.210 (Ref Pet for Cert-Apx p B14); 12 USC S1709 (Pet. for Cert.-Apx p B6);

28 USC S1331 (Petitioner's "Legal File" to the 8th Cir C.A. filed 11-1-88); 28 USC S1346 (Ref Pet. for Cert., Apx p B10) per Mar v Kleppe 520 F2d 867, 868 (10th Cir 1975) Davis v Romney 490 F2d 1360, 1362 (3rd Cir 1974).

The Waiver of HUD'S sovereign immunity to suit on page 3 of the Petition for Certiorari is properly identified as 12 U.S.C. §1702.

Additional jurisdiction of this court is invoked by the District Court's jurisdiction listed in the Petition for Certiorari, the District Court's jurisdiction above and US S Ct Rule 17; 42 USC S1441; 28 USC S1254(3); 5 USCA S551(4); S553; S706(2)(a); 11 USCA S362(a), S525, and S1107; Diversity Action Jurisdiction F.R.C.P. Rule 4(e), 28 USCA; Rule 4(d)(7), 28 USC (1976 Ed) per the liberal amendment provision of

28 USC S1653 and other provisions or authorities that this Court deems just, proper and equitable.

SUPPLEMENTAL BRIEF

The District Court's ruling that "THE COURT HAS DETERMINED THAT THE EVIDENCE OVERWHELMINGLY SHOWS THAT DEFENDANTS' ACTIONS WERE BASED ON FACTORS OTHER THAN PLAINTIFF'S RACE" (Pet. for Cert., Apx p B11-B12) is in direct conflict with and is so far departed from the accepted and usual course of judicial proceeding expounded in the January 1990 United States Supreme Court case of University of Pennsylvania v E.E.D.C (No. 88-493), as to call for the exercise of this Court's power of supervision.

The District Court's "ALLEGED" evidence was the respondent(s) attempt

at verbal justification of the "AD HOC" meeting referred to on Apx p B9 of the Pet. for Cert. (T. TR 10-11), which is UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL as required in University of Pennvs.

"No matter how rational or consistent congressional intent a particular administrative decision with the respect to dispensing of government benefits may be, determination of eligibility cannot be made on an AD HOC basis" (Pet. for Cert.-Apx p A12, A20, B9) Morton v Ruiz 94 S Ct 1055, 1056, Note 7 (1974) FW/PBS Inc. v Dallas (No. 87-2012) decided by the U.S. Supreme Court in January 1990.

"WHERE CONGRESS HAS CONSISTENTLY MAKE EXPRESS ITS DELEGATION OF PARTICULAR POWER, ITS SILENCE IN PARTICULAR STATUTE IS STRONG EVIDENCE

THAT IT DID NOT INTENT TO GRANT THAT POWER" Alocoa Steamship Company v Federal Maritime Commission 348 F2d 756 Note 2 (D.C. Cir 1965).

"WHETHER THE PRACTICE OF LAW IS A 'RIGHT' OR A 'PRIVILEGE' NEED NOT HERE BE DETERMINED, IT IS NOT A MATTER OF THE STATE'S GRACE AND A PERSON CANNOT BE BARRED EXCEPT FOR VALID REASONS" and only then in accordance with due process Schware v Board of Bar Examiners 353 U.S. 232 Notes A & D (1957) Cleveland Board of Education v Loudermill 470 U.S. 532, 533 (1985).

Respondent(s) ALLEGED evidence that racial discrimination was not the reason or part of the reason for nonrecertification (nontenure) was respondents(s) verbal justification, UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL, that "I believe at that point in time that two

out of the six or seven that were not recertified were minority -- black minority" (T. Tr p27) and the ALLEGED verbal fact, UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL that a Black supervisor ALLEGLY participated in the AD HOC meeting (T. Tr p17, 29; Pet. for Cert., p B9-B10), and the secret factors, unrevealed to plaintiff, which were considered by respondent(s) in violation of Independent Meat Packers Association v Butz 526 F2d 228, 239 Note 30 (8th Cir 1975) cert. denied 424 U.S. 361 U.S. 966 In re Ruffallo 390 U.S. 543, 550 (1968) Stirone v U.S. 361 U.S. 212.

Plaintiff requested disclosure of the written peer review material because "IF THERE IS A "SMOKING GUN' TO BE FOUND THAT DEMONSTRATES DISCRIMINATION IN TENURE DECISIONS, IT IS LIKELY TO BE

TUCKED AWAY IN PEER REVIEW FILES" and the "FACT THAT BLACK SUPERVISOR WAS INVOLVED IN DECISION TO TERMINATE BLACK EMPLOYEE DID-NOT PRECLUDE FINDING OF RACIAL DISCRIMINATION" id. University of Pennys, In Re Lewis (6th Cir 1988) Rehearing and Rehearing En Banc Denied 6-29-88.

Further, Respondent(s) actions were a "SELECTED PROSECUTION OF PLAINTIFF IN VIOLATION OF HIS RIGHT TO DUE PROCESS, because "MR. SUTTON WAS THE ONLY ONE THAT YOU DIDN'T RECERTIFY WHO HAD NO PROBLEM WITH HIS PERFORMANCE AS AN APPRAISOR; ISN'T THAT CORRECT ? -- YES SIR. THAT'S CORRECT." (T Tr p28; Defendant Answer 1 to Plaintiff's First Set of Intorrogatories)

THE DISTRICT COURT DID-NOT RULE ON THE DUE PROCESS ISSUE (Pet. for Cert. p A9, Footnote 3).

Instead, the District Court did the same thing as the Appeal Court, and that was to conduct a "de-nova" review of respondent(s)'s decisionmaking reasoning.

The parties to this action DID-NOT and CAN-NOT consent to said "de-nova" review, and THE LOWER COURTS WERE NOT EMPOWERED TO CONDUCT SAME TO "JUSTIFY" RESPONDENTS ACTION (Plaintiff's "Motion in Liminee" filed in District Court 11/9/87; T Ph p 37) id. Independent Meat Packers, id. In re Rufallo, id. Stirone v U.S.

Disclosure of respondent(s) peer review material was a NECESSARY REQUIREMENT, if the District Court was to conduct a judicial review of the Administrative Agency decision to deny recertification (tenure) id. University of Pennys, Missouri Teacher Tenure Act

V.A.M.S. 168.104 (Op. Atty. Gen. No. 233, Holliday 10-24-72).

The recertification system operated by respondent(s) is an unconstitutional prior restraint, in violation of due process, because it gives respondant(s) unlimited discretion to nonrecertify and/or terminate members of the fee appraisal panel in violation of FW/PBS, Inc. v Dallas (No. 87-2012) decided January 1990, Kolender v Lawson 461 U.S. 352 (1983) Standard Airlines v Civil Aeronautics Board 177 F2d 18, 20, Notes 1-3 (D.C. Cir 1949) id. Missouri Teacher Tenure Act.

"WHERE AN ACT TO BE PERFORMED BY a court or OTHER AUTHORITY WILL ESPECIALLY AFFECT A PARTICULAR INDIVIDUAL, REASONABLE NOTICE SHOULD BE GIVEN TO HIM, SO THAT HE MAY APPEAR AND BE HEARD, EVEN THOUGH THE GIVING OF NOTICE IS NOT

REQUIRED BY STATUTE, and that, WHERE STATUTE CONFERS POWER ON a judicial or AN ADMINISTRATIVE AGENCY TO RENDER A JUDGEMENT OR MAKE AN ORDER AFFECTING RIGHTS OF PERSONS OR PROPERTY, AND NO PROVISION IS MADE FOR NOTICE, THE COURT WILL REQUIRE A REASONABLE NOTICE". 66 Corpus Juris Secundum (C.J.S.) "Notice Section" 14, p 652); Hoppe, Inc. v St. Louis Public Co. 361 Mo. 402, 235 S.W. 2d 347 (Mo. Banc 1951); id. Cleveland Board of Education v Loudermill.

PETITIONER'S AFFIDAVIT OF SERVICE OF REPLY BRIEF TO THE RESPONDENTS ANSWER TO THE PETITION OF CERTIORARI

Upon Respondent(s) and upon Solicitor General, Department of Justice, Washington D.C. 20530.

I, the undersigned petitioner do solemnly state on oath of affirmation that I have served a copy(ies) of subject Writ of Certiorari, in accordance with "Rules of the Supreme Court of the Unites States(Adopted April 14, 1980; Effective June 30, 1980; Including Revisions of November 21, 1980) on the Solicitor General, Department of Justice at the above noted address and to Respondent(s) Attorney Joseph B. Moore, Assistant U.S. Attorney, at his office 1120 Market

Street-Suite 414, St. Louis, Missouri 63101 on this 21st day of January 1990. Said service to the Solicitor General and To the U.S. Attorney was done by certified mailing thru the U.S. Postal Service return Receipt requested.

Emerson Sutton
2141 Yale
Maplewood, Missouri 63143
(314) 781-2222

Subscribed and sworn to before me this 21st Day of January 1990.

Notary Public
State of Missouri
County of St. Louis

My Commission Expires APRIL 11, 1992